(25)

BEFORE THE

Supreme Court of the United States

October Term, 1943

No. 377

NATHAN GOLDSMITH and THE MANHATTAN COFFEE & SUGAR COMPANY, INC.
Petitioners, and Appellants below,

v.

UNITED STATES OF AMERICA,
Respondent, and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

C. L. DAWSON
MELVIN D. HILDRETH
Attorneys for the Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petioners, and the appellants below, pray that a writ of certiorari issue to review the the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case on August 19, 1943 (R. 506).

OPINIONS BELOW

The United States District Court for the Eastern District of New York did not render an opinion. The opinion of the Circuit Court of Appeals for the Second Circuit has

not been reported but the same is set forth on pages 501 to 505 of the record.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on August 19, 1943 (R. 506). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. This petition is filed within 30 days from the date of the entry of the judgment as required by rule of Court.

STATEMENT OF FACTS

Nathan Goldsmith, petitioner, a man of limited education (R. 240) had engaged in the legitimate sugar and coffee business since the year 1916 (R. 239) under the firm name of the petitioner, Manhattan Coffee & Sugar Company, Inc. He was the President and Secretary of the corporation (R. 239). As a dealer in sugar he was required to register with the Office of the Price Administration the amount of sugar he "owned" on April 28, 1942. The petitioner, Goldsmith reported on April 28, 1942 (R. 364 Gov. Ex. 4a) that for institutional and industrial purposes his present inventory (number of pounds of sugar owned by registering unit) was "00" lbs. The petitioners were also required to register the amount of sugar on hand as retailers and wholesalers. This last requirement was also complied with by the petitioners on April 28, 1942 (R. 358 Gov. Ex. 3). In this registration blank the petitioners stated that they had a present inventory of 4,000 lbs (Gov. Ex. 3 R. 358).

Prior to the time for registration the petitioner, Goldsmith (R. 252) talked with members of the sugar trade as to the manner of answering the registration blanks, and also consulted counsel (R. 253) and was informed that the "present inventory" meant sugar in his possession which he could sell to a grocer.

While the petitioners did not actually have in their possession, or control any sugar, nor any title to sugar on April 28, 1924, they did have an option on sugar held in the name of two banks, Finance Trust, and the Modern Industrial Bank, and also with the David S. Stern Corporation. None of the bills of lading for said sugar, or the warehouse receipts were in the name of the petitioners, and title to all of the said sugar was vested in the two banks, or the David S. Stern Corporation, with the right of the petitioners to draw upon said sugar by cash payments at the time of the delivery (R. 374, 350, 344, 370).

The United States claims that the petitioners should have reported this sugar as "owned" by the petitioners on April 28, 1942. The registration blanks did not refer to any sugar under contract or option. They made specific reference only to the sugar "now owned" by the registering unit. The petitioners were given no opportunity by the officers or agents of the United States to correct any error, if one was made, but the sole contacts by the officers of the United States were made for the sole purpose of obtaining evidence, if possible, sufficient to sustain an indictment. The first time any sugar came into the possession of the petitioners under the option to purchase was on July 13, 1942 (R. 74).

The petitioners were indicted on two counts (R. 6-8). The substance of the indictment (R. 6) charges in the first count that the petitioners violated Section 80 of Title 18, U. S. Code by knowingly and willfully making a false statement, the specific charge being (R. 7):

> "that the present inventory (number of pounds of sugar now owned by registering unit for sale) was 4,000 pounds, whereas in truth and in fact, as the said defendants then and there well knew, the defendants owned for sale on said date and at the said time approximately 517,000 pounds of sugar."

The second count likewise charged that the petitioners

willfully and knowingly made a false statement as follows: (R. 7-8)

> "that the present inventory (number of pounds of sugar now owned by registering unit) was naught (00) pounds, whereas in truth and in fact, as the said defendants then and there well knew, the defendants owned on the said date and at the said time approximately 517,000 pounds of sugar."

The petitioners moved for a dismissal of the indictment at the close of the government's case upon the ground that the guilt of the petitioners had not been established beyond a reasonable doubt (R. 210). This motion was denied, and exception was taken (R. 210). The motion was renewed upon the same grounds at the close of the trial and was again denied by the Court with an exception noted (R. 326). The jury found the petitioners guilty on both counts of the indictment (R. 339). The petitioner, Goldsmith, was sentenced to imprisonment for two years on each count (R. 2), and the petitioner, Manhattan Coffee & Sugar Company, Inc., was fined $2,500.00 (R. 2). The judgment of the District Court was affirmed by the Circuit Court (R. 506).

STATUTES INVOLVED

The petitioners were indicted under the following statute:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudlent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a

material fact, or make or cause to be made any false or fraudlent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (52 Stat. 197; 18 U. S. C. A. 80).

QUESTIONS PRESENTED

There are three general questions of law raised by this petition. The petitioners assert the following errors.

1. That the District Court erred in overruling the motion of the petitioners to dismiss the indictment made at the close of the government's case (R. 210), and again erred in failing to sustain the motion to dismiss the indictment made at the close of all of the evidence (R. 236) for the reason that there was no evidence to establish the guilt of the petitioners as a matter of law. That the Circuit Court erred as a matter of law in affirming the judgment on this ground.

2. That the District Court erred in instructing the jury in regard to the ownership of the sugar in question, and that the Circuit Court erred in failing to reverse the judgment upon this ground.

3. That the District Court Judge erred in his charge to the jury, and by refusing requested instructions, and by commenting at length upon the evidence offered by the United States, and in making no favorable comment on the evidence offered by the petitioners, but in fact, ridiculing the contentions of the petitioners, which comment of the Court, and charge to the jury was in effect a direction to the jury to bring in a verdict of guilty on both

counts of the indictment against the petitioners. That the Circuit Court erred in not reversing the judgment on this ground alone.

REASONS FOR GRANTING THE WRIT

The petitioners assert that the writ of certiorari should be granted under subdivision 5(b) of Rule 38 of this Honorable Court because the United States Circuit Court of Appeals for the Second Circuit has affirmed a judgment of the District Court for the Eastern District of New York of conviction upon evidence which is wholly insufficient to show that the petitioners committed any crime as charged under the indictment under the decisions of this Honorable Court, and the decisions of other Circuit Courts of Appeal. That the decision of the Circuit Court of Appeals for the Second Circuit conflicts with the decisions of this Court on the question of ownership of the sugar in question. That the decision of the Circuit Court of Appeals finding no error in the instructions to the jury conflicts with the decisions of this Court, and other Circuit Courts of Appeal, and that the Circuit Court of Appeals further erred in failing to reverse the judgment on the grounds that the District Judge erred in commenting to the jury on the evidence, and that the error in this regard conflicts with the decisions of this Honorable Court, and other Circuit Courts of Appeals. All of which will be more fully shown by the brief of the petitioners. That this Court in the interest of right and justice should invoke its jurisdiction in order to prevent a serious miscarriage of justice.

CONCLUSION

WHEREFORE, Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding and directing that Court to send to this Court for its review and determination its complete record in this case, and upon a review thereof, that the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case be vacated and reversed, and this case be remanded to the said Circuit Court with instructions to proceed further as ordered and directed by this Court.

C. L. DAWSON
MELVIN D. HILDRETH
Attorneys for the Petitioners.

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No.

NATHAN GOLDSMITH and THE MANHATTAN COFFEE & SUGAR COMPANY, INC.
Petioners, and Appellants below,

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UNITED STATES OF AMERICA,
Respondent, and Appellee below,

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

The statement of the case in the foregoing petition is sufficient for the purpose of this brief as to the questions raised with the exception of the evidence on the insufficiency of the proof to sustain the charges made in the indictment. In this regard attention will be invited to the pertinent parts of the record. The brief discusses in order the three questions raised as shown on page 5 of the petition.

QUESTION No. 1

That the District Court Erred in Overruling the Motion of the Petitioners to Dismiss the Indictment Made at the Close of the Government Case (R. 210), and Again

Erred in Failing to Sustain the Motion to Dismiss the Indictment Made at the Close of All of the Testimony (R. 236) for the Reason That There Was No Evidence to Establish the Guilt of the Petitioners as a Matter of Law. That the Circuit Court Erred as a Matter of Law in Affirming the Judgment on This Ground.

The indictment charges in two counts (R. 6-8) that the petitioners, unlawfully, willfully and knowingly did make or cause to be made false statements in connection with the registration for the issuance of sugar certificates. The first count (R. 6) alleges that the petitioners had an inventory of 517,000 pounds of sugar whereas only 4,000 pounds of sugar was reported on the registration form. The second count alleges that the petitioners (R. 7-8) stated in the application for registration that they owned 00 pounds of sugar, whereas the petitioners on April 28, 1942, owned 517,000 pounds of sugar.

The question of whether there was sufficient evidence to sustain the allegations of both counts of the indictment turns on two questions of law.

The fact that the petitioners executed the applications in question did not constitute a crime. The petitioners were engaged in the lawful and legitimate business of buying and selling sugar, and has been so engaged since the year 1916 (R. 239). The first material question of law to be determined is whether the petitioners were the owners of 517,000 pounds of sugar on April 28, 1942, the date that the applications were signed.

The United States called a number of witnesses to show that the petitioners had an option on the sugar on this date. (R. 9, 17, 31, 44, 54, 57, 69, 82). To summarize the record shows the following transactions which are not disputed:

> April 10, 1942 (R. 374) 1200 bags of sugar to be shipped from Mobile. Contract with Hershey Sugar Sales Corporation.

April 10, 1942 (R. 352) 1070 bags of sugar. Contract with Olavarria & Co. To be shipped from Tampa. $500.00 was deposited on this account (R. 350).

April 10, 1942 (R. 344-345) 900 bags of sugar. Contract with Olavarria & Co.

April 24, 1942 (R. 370-371) 2000 bags of sugar. Contract with Olavarria & Co.

In three instances, the Finance Trust Company, and the Modern Industrial Bank took over the sugar (R. 42, 45). On the other contract, the David S. Stern Corporation took over 1070 bags of sugar (R. 57, 59).

None of the bills of lading or the warehouse receipts for the sugar was placed in the name of the petitioners (R. 456, 442, Gov. ex. 17, 426, Gov. ex. 15B, 356-357, 348). The petitioners on April 28, 1942, owned no sugar and at the most they had acquired an option or contract to buy sugar. Title to the sugar was in the bankers. The first time that the petitioners acquired any sugar which actually passed into their possession was on July 13, 1942 (R. 74).

Under these circumstances, the petitioners earnestly contend that they were not the owners of the sugar in question on April 28, 1942.

The question asked in the registration form was:

> "7. Present inventory (number of pounds of sugar now owned by registered unit)" (R. 364 Gov. ex. 4A)

which question was answered by the petitioners as follows "00 lbs."

The question asked on the retailers and wholesalers application was:

> "f. Present inventory (number of pounds of sugar now owned by registering unit for sale)"

which question was answered by the petitioners "4000 lbs." (R. 358 Gov. ex. 3, opposite page).

Neither of the forms contained any explanation as to the present inventory or of the words "now owned." The petitioners therefore had no guide to follow in the answering of the questions.

The petitioners contend that they have a right to construe the words "now owned" or "owned" as they are used in their customary and ordinary meaning. Webster's standard dictionary defines "now" as the "present time", and the word "own" or "owned" as "belonging to", to "possess or hold by right", and the word "ownership" is defined as "rightful possession".

In the case of *Baltimore Dry Docks & Ship Co.* v. *New York*, 262 Fed. 485, 488, the Fourth U. S. Circuit Court of Appeals said that the words "owned by" means an absolute and unqualified title.

In the case of *Morris Foundry* v. *Commissioner of Internal Revenue*, 52 Fed. (2) 839, the Sixth U. S. Circuit Court of Appeals held that although stockholders controlled at least 95% of the stock, that this was insufficient to come within the word "owned" under the revenue Act. See also the case of *U. S.* v. *Cleveland P. & E. R.R. Co.*, 42 Fed. (2) 413, which holds that the words "controls" and "owns" are not synonymous.

Where a church organization holds property under a contract for deed, it does not "own" such property for the purposes of exemption from taxation.

> *Peoples* v. *Logan Square Presbyterian Church*, 94 N. E. 155, 249 Ill. 9.

The word "owner" when used alone imports an absolute owner or one who has complete dominion of the property, as the owner in fee of real property.

> *McFeters* v. *Pierson*, 24 Pac. 1076, 1077, 15 Colo. 201.
> To the same effect:
> *Ramsey* v. *Leeper*, 168 Okla. 43, 31 Pac. (2) 852, 861.

The question has been decided authoritatively by the

Courts of the State of New York, favorable to the petitioners, under facts very similar to the facts in this case.

First National Bank v. *Dean*, 137 N. Y. 110, 117.
Moors v. *Kidder*, 106 N. Y. 43, 44.
F. & M. National Bank v. *Logan*, 74 N. Y. 568.

The question of ownership has also been decided by this Honorable Court under statement of facts very similar to the facts in this case.

Dows v. *National Exchange Bank*, 91 U. S. 618.
Gibson v. *Stevens*, 49 U. S. 384.
Halliday v. *Hamilton*, 78 U. S. 560, 564.

An exhaustive search of the authorities indicates that none of the above decisions of this Honorable Court has been overruled.

The decision of the Circuit Court in this case on the question of ownership clearly conflicts with the ruling of this Court in the case of *Dows* v. *National Exchange Bank*, supra. Under the law of the State of New York, the petitioners assert without fear of contradiction, that the petitioners did not own the sugar in question on April 28, 1942. Upon this basis alone the District Court should have sustained the motion to dismiss the indictment.

There Was No Evidence That the Petitioners Willfully and Knowingly Made False Statements

The United States proved only the execution of the registration forms. The forms contained no information as to the manner of execution (R. 358, Gov. ex. 3, opposite page, 364, Gov. Ex. 4A opposite page) or the explanation of the words "now owned". It was incumbent upon the United States to prove not only that the answers made by the petitioners were false, but that they were known to be false by the petitioners when made.

Hargrove v. *United States*, 67 Fed. (2) 820, 5th CCA.

The petitioner, Goldsmith attempted to ascertain what should be reported in the inventory, and was informed by the sugar trade, and in fact, by his counsel, that he did not have to report the sugar which he did not own (R. 244-251). The petitioner did not attempt to conceal the sale of any sugar made after the same had come into his possession. He regularly made reports of sale to the Alcohol Tax Unit (R. 244) as required. The petitioner, Goldsmith denied any intention to defraud the government (R. 256) when he signed the applications and asserted that he signed the same in good faith believing the facts stated to be true (R. 256).

No proof was offered by the United States to contradict this testimony of the petitioner, Goldsmith. There was no showing that the petitioner, Goldsmith had actual knowledge of any regulation requiring the sugar to be reported.

This proof was required before a verdict of guilty may be sustained under the decisions of this Court.

This Court held in the recent case of *Spies* v. *United States* (87 L. Ed. Adv. 342) that one could not be convicted under the Revenue Act of 1936 for a willful attempt in any manner to defeat or evade a tax without proof of some willful omission, such as an example of evil motive.

Willfully means something more than expressed by knowingly, else both terms would not be used.

United States v. *Ill. Central R.R. Co.*, 303 U. S. 239.

In the case of *Murdock* v. *United States*, 290 U. S. 389, at page 396, this Honorable Court said:

> "The word wilfully means more than voluntarily. * * * Congress did not intend that a person by reason of a bona fide understanding as to his liability for a tax, as to his duty to make a return, or as to the adequacy of the records maintained should become a criminal by his mere failure to measure up to the required standards of conduct * * * It follows that the respondent was entitled to his instruction as to his good faith."

While the above case was a prosecution under the Income Tax laws, the same principle applies in this case. Congress certainly never intended that a legitimate business man like the petitioner, Goldsmith, should become a criminal because he literally answered questions correctly, or made at the most an honest mistake. If the petitioner had answered the questions to the effect that he was the owner of the sugar the answers would have been false under the decisions of this Court, and the law as construed by Courts of New York.

Petitioners assert that under the decisions of this Honorable Court the District Court should have granted the motion to dismiss the indictment because of failure of proof.

QUESTION No. 2

That the District Court Erred in Instructing the Jury in Regard to the Ownership of the Sugar in Question, and That the Circuit Court Erred in Failing to Reverse the Judgment Upon This Ground.

The District Court charged the jury as follows (R. 337):

> "If the Manhattan Coffee and Sugar Company actually contracted with Olavarria and Hershey for the purchase of sugar and then borrowed money in order to complete the purchase or to make the purchase possible, the sugar was legally the property of the Manhattan Coffee and Sugar Company, just exactly as your house is your property although you have a mortgage on it, although you borrow money in order to make the purchase, it is your house."

This instruction was clearly erroneous. In the case of a purchase of a house, title by deed passes, together with the immediate right of possession of the property. Title to the sugar in question was not in the petitioners, the bankers held the title and had complete control and possession of the sugar. The only right that the petitioners had under the agreement was to exercise an

option to purchase, and upon a cash payment to obtain the sugar. The instructions on the title to the sugar are contrary to the law of New York, and the decisions of this Court which decisions are hereinbefore cited, and will not be repeated for the sake of brevity.

QUESTION No. 3

That the District Court Judge Erred in His Charge to the Jury, and by Refusing Requested Instructions and by Commenting at Length Upon the Evidence Offered by the United States, and in Making No Favorable Comment on the Evidence Offered by the Petitioners, But in Fact, Ridiculing the Contentions of the Petitioners, Which Comment of the Court, and Charge to the Jury Was in Effect a Direction to the Jury to Bring in a Verdict of Guilty on Both Counts of the Indictment Against the Petitioners. That the Circuit Court Erred in Not Reversing the Judgment on This Ground Alone.

The District Judge charged the jury (R. 328-337). In the charge, the Court commented as follows (R: 330):

> "I don't quite understand whether it was the defendant's position that he was not required to report the five thousand odd bags of sugar because they did not belong to him or whether it was his position that he just made an unfortunate error, or an error that was based upon an honest attempt to ascertain what his duty was, and then a failure to perform that duty through no evil purpose or merely because of the difficult situation that confronted him."
>
> "I say that I have not been able to come to a conclusion as what the defendant's theory is but I am bound to say to you that does not make any difference. The defendant is not required to present any theory. He has the right to remain mute in the face of any charge which is made in a criminal case, so it does not matter whether it is difficult to ascertain what the theory of the defense is. *I only refer to it because it might tend*

to explain the extended nature of the trial. (R. 331.) (Italics supplied.)

The above comment was excepted to by the petitioners (R. 337).

The petitioners do not dispute the right of the District Judge to make a fair comment on the evidence and facts in the case, but in so doing it was the duty of the Court to make a fair comment on the evidence offered by both parties, and to fairly review the evidence offered by the petitioners as well as that offered by the United States.

Starr v. *United States*, 153 U. S. 614, 626.
Hickory v. *United States*, 160 U. S. 408, 423.

In this case, the District Judge only commented on the unfavorable evidence offered by the petitioners, and the favorable evidence offered on the part of the United States, and, it is clear, in view of the above decisions that reversible error was committed by the trial Court. Most of the charge given by the trial Court was argument, such as is quoted above, to the effect that the Court could not understand the theory of the defense, and in effect, the petitioners had wasted the time of the Court and jury by a long trial when there was no defense to the criminal indictment.

The Court did not properly instruct the jury on the question of good faith and honest mistake which was a complete defense to the criminal charge. It is true that the Court did instruct the jury on the question of "intent", but the instructions in this regard were vague and misleading, and were totally destroyed by the comment of the Court quoted herein. The petitioners requested several instructions (R. 340) which would have cleared up the matter of good faith and honest belief. Requested instructions No. 3 and 5 (R. 340) would have covered the matter. Since the question was not adequately covered by the instructions of the trial Court the refusal to

grant the requested instructions constitutes reversible error. Exception was taken to the refusal to grant the requested instructions (R. 338).

In this connection see the case of *Murdock* v. *U. S.*, supra.

There are a large number of cases which support the position of the petitioner on all grounds which have been omitted for the sake of brevity. If this petition for the writ is granted by this Honorable Court a supplemental brief will be filed.

CONCLUSION

Your petitioners respectively urge that this Court grant the Writ of Certiorari petitioned herein.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 377

NATHAN GOLDSMITH AND THE MANHATTAN COFFEE AND SUGAR COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 501–505) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 19, 1943 (R. 506). The petition for a writ of certiorari was filed September 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in registering with the Office of Price Administration under the sugar rationing program as a wholesaler and industrial user of sugar, Manhattan had 517,000 pounds of sugar which it was required to report as part of its present inventory of sugar, and, if so, whether Goldsmith, who filed the registration forms for the corporation, acted wilfully and knowingly in failing to do so.

2. Whether in charging the jury the court improperly commented on the evidence, erred in its instruction on the ownership of the sugar, and erred in refusing petitioners' requested instructions to the jury.

STATUTE OND REGULATIONS INVOLVED

Section 35A of the Criminal Code (18 U. S. C. 80) and pertinent provisions of Ration Order No. 3, issued by the Office of Price Administration, are set forth in the Appendix, *infra,* pp. 17–22.

STATEMENT

Petitioners were indicted on November 2, 1942, in the District Court for the Eastern District of New York in two counts, each charging a violation of Section 35A of the Criminal Code (R. 6–8). Count I charged that for the purpose of inducing

the Office of Price Administration to issue sugar purchase certificates for 379,333 pounds of sugar, petitioners on April 28, 1942 falsely represented in an application for the registration of retailers and wholesalers that the corporate petitioner's "present inventory" of sugar was 4,000 pounds, whereas, as petitioners knew, the actual inventory was approximately 517,000 pounds (R. 6–7). Count II similarly charged that in a registration of industrial users of sugar on April 28, 1942, petitioners falsely represented that the corporation's "present inventory" of sugar was "00" pounds, whereas, as petitioners knew, the actual inventory was approximately 517,000 pounds (R. 7–8).

At the trial, petitioners moved for a directed verdict at the close of the Government's case (R. 210) and at the close of the trial (R. 326) on the ground that the Government had not established the guilt of petitioners beyond a reasonable doubt. These motions were denied. The jury found petitioners guilty as charged on both counts of the indictment (R. 339). Goldsmith was sentenced to imprisonment for two years on each count, the sentences to run concurrently, and the corporation was fined $2,500 (R. 2). Upon appeal to the court below both convictions were affirmed (R. 506).

The pertinent evidence adduced at the trial may be summarized as follows:

The corporate petitioner is engaged in the wholesale distribution of sugar and coffee and

restaurant and baker's supplies; it manufactures a syrup, cordials, and extracts and it jobs groceries (R. 239). Goldsmith is president and treasurer of the corporation and he has been "running the business * * * exclusively since 1920" (R. 240).

On April 28, 1942, the day designated by the Office of Price Administration for the registration of persons engaged in the sugar trade (R. 200), Goldsmith, on behalf of the corporation, applied to the Office of Price Administration on O. P. A. Form R. 305 for registration as a wholesale distributor of sugar, stating that the corporation's "present" inventory of sugar was 4,000 pounds, and requesting the issuance of sugar purchase certificates to the corporation for 379,333 pounds of sugar (Gov't Ex. 3, R. 359–360). He also applied on O. P. A. Form R. 310 for registration as an industrial user of sugar, stating that the corporation's "present inventory" was "00 lbs." (Gov't Ex. 4A, R. 365–367). Both applications were signed by Goldsmith acting for the corporation (R. 192). On the basis of the representations made in the applications, the Office of Price Administration issued to the corporation sugar-purchase certificates, authorizing the acquisition by the corporation of 379,333 pounds of sugar for wholesale distribution (Gov't Ex. 30, R. 471) and 126,000 pounds for industrial use (Gov't Ex. 29, R. 470).

The charges in this case arise from Manhattan's part in four sugar transactions in April 1942. The relevant evidence with respect to the first transaction shows that on April 10, 1942, Goldsmith, on behalf of Manhattan, signed a contract for the purchase of 900 bags of offshore refined sugar (Gov't Ex. 1B, R. 344–347). The contract fixed the sale price at $5.40 per hundred-pound bag, "less 2% C. O. D. certified check—$500 paid on account" (R. 344). Among the "conditions of purchase" enumerated in the contract was the provision that delivery would be made as soon as possible after receipt of instructions from the buyer and that delivery was complete on receipt of the goods by the carrier (R. 344–345). Manhattan was billed on the same day for the purchase price of the sugar (Gov't Ex. 1A, R. 343). On April 13 Goldsmith arranged with the Modern Industrial Bank for a loan of $3,600 secured by a warehouse receipt for the sugar (R. 37, Gov't Exs. 11, 11A, R. 381–389). On or about April 15, 1942, the sugar was delivered to a warehouse with which Goldsmith had arranged for storage (R. 67–70). The vice president of the bank testified that on that day Goldsmith delivered the warehouse receipt for the sugar to the bank, and, "We loaned the Manhattan Coffee and Sugar Co. $3,600" (R. 37).[1] The

[1] Although the loan was for $3,600, the bank check was for $4,762.80, the full purchase price for the sugar (Gov't Ex.

warehouse receipt was issued in the name of the bank (Deft. Ex. A, R. 475). The terms of the loan called for the repayment of it in four monthly installments of $900 each, with the proviso that as each payment was made a proportionate amount of sugar would be released from the security arrangement (R. 37). The payments were made beginning on May 9 and ending on August 28, and on each day that the payment was received, the bank issued an order to the warehouse releasing 225 bags of sugar (R. 38; Gov't Ex. 16, R. 437–438). Manhattan paid the storage charges on the sugar (R. 44) and the sugar was insured by the bank with loss, if any, payable to the bank (R. 42). The other three transactions in April were substantially the same in all pertinent respects. As a result of them, 422,000 pounds of sugar were placed in warehouses prior to April 28, 1942, under the same arrangements as those above described.[2] (See R. 44–54, Gov't Ex. 13, R. 403, Govt Ex. 13A, R. 405, Gov't Ex. 13B, R. 406, Gov't Ex. 13–C, R. 407, Gov't Ex. 13G, R. 410, Gov't Ex. 13–H, R. 411, Def. Ex. B, R. 477; R. 57–69, Gov't Ex. 14, R. 413, Gov't

11B, R. 391). Manhattan furnished the additional $1,162.80 (R. 39). It would appear from Paper No. 1 of Government Exhibit 16 (R. 433) that petitioners also surrendered the original bill of lading for the sugar, duly endorsed, to the bank.

[2] The sugar purchased under the contracts totaled 427,000 pounds, but 5,000 pounds was apparently lost in transit (R. 64, 256).

Ex. 14–A, R. 414–418, Gov't Ex. 14–B, R. 419, Gov't Ex. 15, R. 421, Gov't Ex. 15–A, R. 422–426, Gov't Ex. 15–B, R. 427–429, Gov't Ex. 15–C, R. 430–431, Gov't Ex. 20, R. 457, Gov't Ex. 22, R. 459, Gov't Ex. 23, R. 460–463, Gov't Ex. 24, R. 464, R. 246, 256, 310.)

Goldsmith did not report any of the 512,000 pounds of sugar as constituting a part of his "present inventory" in the registrations with the Office of Price Administration (see Gov't Exs. 3, 4, and 4–A, R. 359–367). In explanation of his failure to reveal this sugar, Goldsmith testified that on and after April 6, 1942, he was obligated to deliver 225,000 pounds of sugar to the Colonial Candy Company and that in the middle of April he decided to use approximately 300,000 pounds of sugar for manufacturing an icing which Manhattan sold commercially (R. 261–264, 271–274, 300). The petitioners' evidence concerning the alleged sale to the Colonial Candy Company is as follows:

In March 1942 petitioners entered into negotiations with an unidentified person allegedly representing the Colonial Candy Company for the sale to Colonial of 225,000 pounds of sugar and on April 6, 1942, that person paid petitioners $1,500 in cash to be applied on the purchase price of the sugar (R. 131, 262–263, 303–307). Goldsmith testified that he regarded the transaction as a "final sale * * * on the date we received the deposit" (R. 282), and that he segregated 225,000

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pounds for delivery to Colonial (R. 284). None of the sugar was delivered prior to April 28 (R. 265) and of the sugar delivered thereafter, some was sugar other than that previously segregated for delivery to Colonial (R. 284, 302–303).

The government witness, Bernikow, who operates the Colonial Candy Company, testified that he had never purchased sugar from petitioners or had any other dealings with them (R. 54–55). The petitioner corporation's books show no record of the receipt of $1,500 from the Colonial Candy Company or any person representing Colonial (R. 128–129); Goldsmith did not give a receipt for the money to the person from whom he claims to have received it (R. 263–264). On July 2, 1942, and July 16, 1942, representatives of the Office of Price Administration and the Alcohol Tax Unit of the Treasury Department examined the corporate books, but they were unable to find any entries showing a sale to Colonial of 225,000 pounds of sugar (R. 121). In the course of examining the books again on July 20, 1942, they found several bills dated from May 28 to July 16 and showing sugar sales to Colonial in the back of the July salesbook (R. 123). When questioned by the Special Agent of the Alcohol Tax Unit as to why bills from May and June were grouped with July bills in the July book, Goldsmith refused to answer (R. 124).

The evidence with reference to the alleged segregation of 300,000 pounds of sugar for making

icing shows that it is the practice of Manhattan to furnish sugar to a manufacturer of the icing who sells the finished product to Manhattan (R. 194, 272). There was no physical segregation of the 300,000 pounds of sugar from the other sugar in the warehouses which was held for sale (R. 194), and Goldsmith testified that the segregation was "strictly a mental operation" (R. 274). From July 22, 1942, to October 20, 1942, Manhattan did use approximately 300,000 pounds of sugar for manufacturing icing, but not all of it was the sugar which he had previously mentally segregated (R. 274–275, 283–284).

Goldsmith testified that at various times prior to April 28, 1942, he telephoned the War Production Board with reference to sugar rationing (R. 250). After he procured the Office of Price Administration registration forms he consulted with various members of the sugar trade (R. 245, 252) and with his brother, an attorney (R. 253), concerning the information called for by the forms. As a result of these inquiries it was his understanding that "inventory means actual sugar which I can sell to a grocer, to B and C, which my driver brings back a certificate equivalent to the amount of sugar which he delivered" (R. 254).

ARGUMENT

1. On April 21, 1942, the Price Administrator

issued Ration Order No. 3 (7 F. R. 2966) [3] regulating the transfer of sugar on and after April 28, 1942. Section 1407.102 of that order prohibited the delivery of sugar to any retailer or wholesaler except in exchange for ration certificates or stamps, and further provided that no wholesaler should make or accept a transfer of sugar until he had been registered with the Office of Price Administration. The order provided for registration on April 28 and 29, 1942 (Sec. 1407.103), and for the determination of the registrant's working inventory of sugar to be known as the "allowable inventory" (Sec. 1407.105). It further provided that if the registrant's present inventory was less than its allowable inventory, a sugar purchase certificate should be issued in the amount of the difference (Sec. 1407.106). Section 1407.104 provided—

> *Present inventory.*—The present inventory of a registering unit is the aggregate of all sugar in the possession of, or intended to be used by, the registering unit, to which, at the time of registration, the owner of the registering unit has title or holds documents of title, or which was in transit or

[3] Ration Order No. 3 was issued by the Price Administrator pursuant to the Act of January 30, 1942, c. 26, 56 Stat. 23 (50 U. S. C. App., Supp. II, Sec. 901 *et seq.*), W. P. B. Directive No. 1, 7 F. R. 562, Supplementary Directive No. 1E, 7 F. R. 2965. There have been a substantial number of amendments to the order since it was issued, but none are herein pertinent.

> stored for delivery to the registering unit and out of the possession of the vendor of the registering unit prior to April 28, 1942. The owner shall be deemed to have title to sugar regardless of the fact that it may have been mortgaged, pledged, or otherwise used as security in a credit transaction, or that its use may have been prohibited by any order of the War Production Board.
> * * *

The order contained similar provisions with respect to industrial users of sugar (Secs. 1407.81–1407.94).

Thus it is plain that when Goldsmith applied for registration as a wholesaler and industrial user of sugar, he was required to report as the corporation's "Present Inventory" not only the sugar which the corporation owned outright, but also the sugar which it owned subject to security interests of other persons. An analysis of the four April transactions involving 517,000 pounds of sugar clearly reveals that sugar to be in the latter category. Whether the financing transaction between Manhattan and the banks be treated as a pledge of the warehouse receipts as collateral security for the loans (See Restatement, Security, Secs. 2 and 8; 2 Williston, *Sales,* 2nd ed., sec. 440) or as a hybrid security transaction peculiar to the sugar trade, it seems clear that petitioners had a substantial proprietary interest in the sugar, and that, at best, the banks had security title only.

Cf. *In re Richheimer,* 221 Fed. 16, 22–23 (C. C. A. 7); 1 Williston, *Sales,* 2nd ed., secs. 286–286a.

Petitioners' contention (Pet. 3, 10) that the banks owned the sugar outright and that petitioners had no more than an option to purchase the sugar is refuted by the plain facts of this case. In addition, the cases relied upon by petitioners in support of their contention (Pet. 12) are clearly distinguishable on their facts from the instant case. Thus, for example, in *Dow* v. *National Exchange Bank of Milwaukee,* 91 U. S. 618, McLaren & Co. purchased wheat on orders from Smith. McLaren & Co. paid for the wheat, took the bills of lading describing McLaren & Co. as the shippers and provided for delivery to Smith upon his acceptance of drafts drawn upon him (91 U. S., at 618–619). In rejecting the contention that Smith became the owner when McLaren purchased the wheat, this Court said (91 U. S., at 629):

> It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from Smith and Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents.

Compare the undisputed facts in the instant case (*supra,* pp. 5–7) showing that Manhattan purchased the sugar, that the sellers throughout the transaction dealt with Manhattan, that part of the purchase price was paid with Manhattan's funds, and that the remainder was paid with funds loaned by Manhattan on the security of its collateral notes and the warehouse receipts for the sugar.[4]

Under these circumstances it seems clear that on April 28, 1942, the date on which petitioners registered with the Office of Price Administration, Manhattan's "Present Inventory" of sugar included 512,000 pounds in which the banks had a security interest, and that the sugar should have been revealed in the registration forms.

2. As a result of petitioners' failure to report the 512,000 pounds of sugar they obtained sugar-purchase certificates from the Office of Price Administration in excess of their allowable in-

[4] Petitioners cite numerous other cases (Pet. 10–12) dealing with the meaning of the word "own" in varying factual contexts. Even in the absence of the specific language of Section 1407.104 of the Ration Order defining "present inventory" (*supra*, pp. 10–11), which is controlling here, these cases would not be persuasive. It is well recognized that the precise meaning of "own" depends upon the subject matter and the circumstances surrounding the subject matter and the parties. *Prudential Insurance Company of America* v. *Kraschel*, 222 Iowa 128, 266 N. W. 550, 552; *Peterson* v. *Johnson*, 132 Wis. 280, 111 N. W. 659, 660; *Judd* v. *Landin*, 211 Minn. 465, 1 N. W. (2d) 861, 865; *Burns* v. *Winchell*, 305 Mass. 276, 25 N. E. (2d) 752, 755; cf. *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. (2d) 577, 579 (C. C. A. 2).

ventory for wholesale purposes (Sec. 1407.105) and their allotment for industrial purposes (Sec. 1407.86) as provided in the Ration Order. Whether petitioners wilfully and knowingly made the false statements was primarily a question of fact for the jury, depending on whether it believed Goldsmith's testimony. As the court below emphasized (R. 504–505):

> The testimony given by Goldsmith to support his claim that he had sold 225,000 pounds of sugar to another company before April 28th, and consequently acted on his belief that he need not include it for that reason innocently failed to do so, need not, of course, have been believed by the jury and evidently was not. The deduction he made on the basis of a mere mental segregation was of sugar he was likewise shown to have known should have been reported. The so-called segregation rested, of course, upon too flimsy evidence to have been found as a fact by any intelligent juror. * * *

If, as is apparent, the jury disbelieved Goldsmith, the only reasonable inference which it could derive from the evidence was that he intentionally refrained from revealing the 512,000 pounds of sugar for the purpose of obtaining from the Office of Price Administration sugar-purchase certificates to which the corporation was not entitled.

3. In instructing the jury the court stated:

> If the Manhattan Coffee and Sugar Company actually contracted with Olavaria and

> Hershey for the purchase of sugar and then borrowed money in order to complete the purchase or to make the purchase possible, the sugar was legally the property of the Manhattan Coffee and Sugar Company, just exactly as your house is your property, although you have a mortgage on it, although you borrow money in order to make the purchase, it is your house. (R. 337.)

While the technical legal aspects of a security transaction such as the one in this case may differ from a mortgage of real property, it is apparent that both are security transactions of a similar character. Compare the same analogy used by Williston in dealing with transactions similar in some respects with the financing arrangements used by petitioners. 1 Williston, *Sales,* 2nd ed., sec. 286. Once it is recognized that petitioners had more than an option to purchase sugar (Pet. 3, 10), it is plain that the court's resort to the mortgage analogy to make clear to the jury the legal effect of using the sugar for security purposes was free from prejudicial error.

Petitioners' other complaints with reference to the charge to the jury (Pet. 15–16) were first considered by the trial judge and rejected (R. 337–339). The court below likewise found no error in the charge (R. 505). We submit that resort to the full text of the charge (R. 328–337) refutes the contention made. As the court below concluded (R. 505), petitioners had a fair trial in which they lost on the decisive issues of fact.

CONCLUSION

The petition presents no question of importance and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

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Special Assistant to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

OCTOBER 1943.

APPENDIX

Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides in pertinent part:

> * * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make * * * or cause to be made or used any false * * * certificate * * *, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Ration Order No. 3 (7 F. R. 2966) provides in pertinent part:

INSTITUTIONAL AND INDUSTRIAL USERS

§ 1407.81 *Registering unit.* As used in §§ 1407.82–1407.94, such registering unit refers to the institutional or industrial users which are included within such registering unit.

§ 1407.82 *Prohibited deliveries.* On and after April 28, 1941, notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, no person shall make delivery of sugar to any registering unit, and no registering unit shall accept delivery of sugar from any

person except upon the surrender to such person by the registering unit pursuant to Rationing Order No. 3 of a Certificate having a total weight value equal to the quantity of sugar so delivered; except that any sugar which at the time of registration has been included in present inventory pursuant to § 1407.84 may be received without the surrender of Certificates.

§ 1407.83 *Registration.* (a) Registration shall be made on April 28 or 29, 1942, for each registering unit upon OPA Form No. R–310 (Registration of Institutional and Industrial Users) at a registration site designated for the area in which the principal business office of the owner is located.

* * * * *

§ 1407.84 *Present inventory.* The present inventory of a registering unit is the aggregate of all sugar in the possession of, or intended to be used by, the registering unit, to which, at the time of registration, the owner of the registering unit has title or holds documents of title, or which was in transit or stored for delivery to the registering unit and out of the possession of the vendor, prior to April 28, 1942. The owner shall be deemed to have title to sugar regardless of the fact that it may have been mortgaged, pledged, or otherwise used as security in a credit transaction, or that its use may have been prohibited by any order of the War Production Board. Every person who owns one or more registering units must include all sugar to which he has title (except sugar held for personal use and sugar in the possession of his vendor) in the present inventories of such register-

ing units, allocating such sugar among those of his registering units as he selects.

§ 1407.85 *Sugar base.* (a) The sugar base for a registering unit proposing to use sugar for any product or purpose other than the products or purposes set forth in § 1407.241, Schedule A of Rationing Order No. 3, is, for any month, the amount of sugar used by the registering unit for such product or purpose during the corresponding month of 1941.

* * * * *

(e) The information necessary to compute the sugar base of the registering unit in accordance with the provisions of this section shall be entered on Schedule I of OPA Form No. R–310 (Registration of Institutional and Industrial Users).

§ 1407.86 *Allotment.* (a) A registering unit which uses sugar for any of the purposes not enumerated in § 1407.241, Schedule A of Rationing Order No. 3, and which has established a sugar base by registration on OPA Form No. R–310, is eligible for an amount of sugar for each of such purposes which is known as an allotment. The amount of an allotment for each period for which application is made shall be the applicable percentage specified in § 1407.242, Schedule B of Rationing Order No. 3, of the sugar base.

* * * * *

RETAILERS AND WHOLESALERS

* * * * *

§ 1407.102 *Prohibited deliveries.* On and after April 28, 1942, notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, no

person shall make delivery of sugar to any registering unit and no registering unit shall accept delivery of sugar from any person except upon the surrender to such person by the registering unit, pursuant to Rationing Order No. 3, of Certificates or Stamps having a total weight value equal to the quantity of sugar so delivered; except that any sugar which at the time of registration has been included in present inventory pursuant to § 1407.104, may be received without the surrender of Certificates or Stamps. On and after April 28, 1942, no registering unit shall accept delivery of any sugar and no registering unit shall make delivery of any sugar until it has been registered pursuant to the provisions of § 1407.103 of Rationing Order No. 3.

§ 1407.103 *Registration and application: Eligibility.* (a) Registration and application for Certificates shall be made on April 28 or 29, 1942, for each registering unit upon OPA Form No. R–305 (Registration of Retailers and Wholesalers), at a registration site designated for the area in which the principal business office of the owner is located: * * *.

* * * * *

§ 1407.104 *Present inventory.* * * * Every person who owns one or more registering units must include all sugar to which he has title (except sugar held for personal use and sugar in the possession of his vendor) in the present inventories of such registering units, allocating such sugar among those of his registering units as he selects.

§ 1407.105 *Allowable inventory.* (a) A registering unit is permitted to obtain a

working inventory of sugar which shall be known as the allowable inventory.

(b) The amount of the allowable inventory for a registering unit registering as a retailer is the quantity equal to one pound for each dollar of gross sales of all meats, groceries, fruits, vegetables, and similar products made during the week ending April 25, 1942 (or, if the component establishment began operations after April 20, 1942, the estimated sales for the first complete calendar week of operations), or one-quarter of the sugar delivered to and accepted by the registering unit during the month of November 1941, whichever is smaller: *Provided,* that if the component establishment was not in operation during the full month of November 1941, or if the information concerning the quantity delivered to and accepted by the registering unit during November 1941 cannot be ascertained, the allowable inventory shall be computed solely on the basis of the aforementioned gross sales.

(c) The allowable inventory of a registering unit registered as a wholesaler is the quantity of sugar equal to the total obtained by taking the quotient arrived at by dividing the amount of sugar delivered to the registering unit in 1941 by twice the number of months it made deliveries of sugar during 1941, and adding thereto the quantity of sugar equal to the shipping unit by which the registering unit customarily took delivery of sugar on or about December 1, 1941.

§ 1407.106 *Issuance of Certificates at registration.* If the present inventory of

the registering unit is less than the allowable inventory, a Certificate shall be issued by the Registrar to the registering unit in the amount applied for; in no event, however, shall the amount applied for be greater than the difference between the allowable inventory and the present inventory. If application is made for a Certificate in weight value less than the maximum for which such application may be made, the allowable inventory shall be reduced by the amount by which the maximum weight value for which application could be made exceeded the weight value of the Certificate applied for.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

(27)

BEFORE THE

Supreme Court of the United States

October Term, 1943

No. 377

NATHAN GOLDSMITH and THE MANHATTAN COFFEE & SUGAR COMPANY, INC.
Petitioners, and Appellants below,

v.

UNITED STATES OF AMERICA,
Respondent, and Appellee below.

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

C. L. DAWSON
MELVIN D. HILDRETH
Attorneys for the Petitioners.

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PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioners and present this petition for a rehearing on the petition for a writ of certiorari filed in this case.

JURISDICTION

The petition for certiorari was filed on September 24, 1943, and denied on November 8, 1943. This petition for rehearing is filed within twenty-five days from November 8, 1943, in accordance with Rule 33 of this Court.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioners reiterate each and every ground set forth in the original petition, and further suggest to the Court the matters hereinafter discussed.

The brief for the United States filed in this cause predicates the conviction of the petitioners primarily upon the grounds that the Office of Price Administration has issued regulations requiring sugar which was not owned but which had been bought for future delivery to be reported as "now owned." On page 10 of the brief of the United States Section 1407.104 of this regulation is quoted as follows:

> "Present Inventory.—The Present inventory of a registering unit is the aggregate of all sugar in the possession of, or intended to be used by, the registering unit, to which, at the time of registration, the owner of the registering unit has title or holds documents of title, or which was in transit or stored for delivery to the registering unit and out of the possession of the vendor of the registering unit prior to April 28, 1942. The owner shall be deemed to have title to sugar regardless of the fact that it may have been mortgaged, pledged, or otherwise used as security in a credit transaction, or that its use may have been prohibited by any order of the War Production Board."

The petitioners earnestly contend that the question of whether Petitioner Goldsmith was guilty of willfully and knowingly making a false statement must depend solely upon the question of whether there were false answers made in the application of the registering unit.

As an analagous situation, it is believed the rule the courts apply to the construction of criminal statutes should have application in this case. The question is not whether the petitioners violated the regulation quoted and relied upon by the United States, but whether Petitioner Gold-

smith willfully and knowingly made a false answer in the registration application. In plain words, the petitioners assert that only the registration application blanks should be examined to determine the guilt of the petitioners. This would undoubtedly be the rule were you construing a criminal statute. This Court has held that criminal statutes must be strictly construed:

Prussian v. *U. S.*, 51 S. Ct. 223, 282 U. S. 675, 75 L. Ed. 610 (aff 42 F. (2d) 854).

U. S. v. *Fruit Growers' Express Co.*, 49 S. Ct. 374, 279 U. S. 363, 73 L. Ed. 739.

If the rule of a strict construction is applied to the applications signed by the petitioners, it will be readily seen that the evidence is wholly insufficient to show that the Petitioner Goldsmith willfully and knowingly made a false statement. It is only when the regulation is considered that any semblance of a crime is shown. The question asked was pertinent to the sugar "now owned" by the registering unit. Under the decisions of this Honorable Court in the cases of

Dows v. *National Exchange Bank*, 91 U. S. 618.

Gibson v. *Stevens*, 49 U. S. 384.

Halliday v. *Hamilton*, 78 U. S. 560, 564.

the petitioners did not "now own" the sugar which the government contended should have been reported. They did not own the sugar under the decisions of the State of New York as set forth in the original petition herein. The regulation of the Office of Price Administration places a meaning on the words "now owned" not found in the standard dictionaries or in the decisions of the courts, as has been previously pointed out. In this connection, the intention of this Honorable Court is directed to the fact that there is no evidence showing that the Petitioner Goldsmith had any knowledge of the existence of the regulation

in question and he specifically denied that he had any knowledge. There is no evidence whatever showing that he willfully and knowingly made a false statement. The statement he made was literally true, when the application which was signed is considered alone. No notice was given to him that the Office of Price Administration had changed the definition of the words "now ~~opened~~ OWNED" and nowhere in the application blank was the Petitioner Goldsmith required to report sugar on option for future delivery. The Office of Price Administration issued a regulation in effect defining the words "now owned" as applying to future periods of time as well as the present. It is respectfully submitted that they could not change the meaning of the words "now owned" by the simple process of issuing a regulation, any more than they could make "a tomorrow a today" by regulation.

In addition to the authorities cited in the original petition, the petitioners earnestly implore this Honorable Court to reconsider this case in the light of the opinion of this Court in the case of *Vierick* v. *United States*, decided on March 1, 1943, 63 S. Ct. Rep. Adv. 561. In the Vierick case, this Court said:

> "Penal sanctions attach here for willful failure to file a statement when required, or if the registrant 'willfully omits to state any material fact required to be stated.' Unless the statute fairly read, demands the disclosure of the information which petitioner failed to give, he cannot be subject to the statutory penalties."

If there was any crime committed it was the act of the petitioner, Goldsmith, in answering the registration blanks. It seems to counsel for the petitioners that the language of the Vierick case is particularly applicable. Change the word "statute" to "registration blanks" and you have the following:

> Unless the *registration blanks* fairly read, demands the disclosure of the information which the petitioner

failed to give, he cannot be subject to the statutory penalties.

The alleged false answer related to the sugar "now owned" by the registering unit. That question was truthfully answered by the petitioners. The regulation relied upon by the United States to convict the petitioners required the petitioner, Goldsmith, to furnish more information than was asked for in the application blanks used for registration purposes. In fact, the regulation requires him to furnish information not asked for in the registration blanks. In this respect, the facts are clearly within the ruling of this Honorable Court in the Vierick case, supra. For that reason alone, this petition should be granted.

How can the petitioner, Goldsmith, be convicted of willfully and knowingly making a false statement when he had no knowledge of any regulation requiring him to report more information than was required under the registration blanks, and which enlarged the meaning of words as they are ordinarily understood to mean in the English language? How can the petitioner, Goldsmith, be convicted of a crime of willfully and knowingly making a false statement when he applied the same meaning to words used in the registration blanks as this Court did in cases involving the same question of ownership? It is respectfully submitted that the petitioner, Goldsmith, had a right to rely upon the advice of his counsel, and the decisions of this Honorable Court under a state of facts similar to the situation in which he found himself. The facts of this case are almost identical with the facts in the case of *Dows* v. *National Bank*, 91 U. S. 618, and this Court in the administration of justice should see that an innocent man is fully protected.

A great and a grave injustice has been done to the petitioners, and this Court, in view of its previous decisions in the *Dows* v. *National Exchange Bank*, 91 U. S. 618,

Gibson v. *Stevens*, 49 U. S. 384, *Halliday* v. *Hamilton*, 78 U. S. 560, 564, and *Vierick* v. *United States*, *supra*, should grant the writ of certiorari and thus prevent a miscarriage of justice.

CONCLUSION

For the foregoing reasons, the petitioners respectfully urge that a rehearing be granted; that upon further consideration that the order of November 8, 1943, denying the petition for certiorari be revoked, and that the writ of certiorari issue.

C. L. DAWSON
MELVIN D. HILDRETH
Attorneys for the Petitioners.

I, C. L. DAWSON, of counsel, for the petitioners, Nathan Goldsmith and The Manhattan Coffee & Sugar Company, Inc., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

C. L. DAWSON
Attorney for the petitioner.